(ii) In every case the owner of the house shall be deemed to have permitted such erection until the contrary is proved.

(iii) Any person who acts in contravention of this section shall be liable to a fine of twenty-five dollars, and to a further fine of ten dollars for each day after conviction during which such erection is allowed to remain."

We fear that in so deciding the learned judge would appear to have disregarded the Court of Appeal decision given by Thomson C.J. in *Hooi Chuk Kwong* v. *Lim Suw Choo*,[1] on the proper interpretation of the phrase "which exposes the landlord to any penalty, fine or forfeiture" in paragraph (k) of section 13(1) of the Control of Rent Ordinance 1948. There it was held that "exposure to prosecution is not enough. There must be exposure to conviction and there is no exposure to conviction unless facts exist which would support a conviction". The appeal was allowed on this ground which, being the *ratio decidendi* therein, was binding on the High Court. In the instant case the Raub Town Council had decided in 1969 not to prosecute because they were of opinion that there was no breach of the building by-law. Such being the undisputed facts — and no prosecution having arisen during the three subsequent years — the respondents clearly could not in 1972 maintain that they were "exposed" to any penalty, fine or forfeiture. The appellants therefore were protected tenants because paragraph (k) was not available to the landlords as a ground for recovering possession. Even had the Town Council acted wrongly in deciding not to prosecute, it was well within their powers so to act because section 18 of the Town Boards Enactment (Cap. 137) gave the Chairman an absolute discretion to compound offences and the Town Council cannot by mandamus be ordered to prosecute.

It was sufficient on this ground alone for us to hold that the appeal should be allowed and the order for repossession set aside.

It may be added that paragraph (k) of section 16(1) under the Act of 1966 differs from paragraph (k) of section 13(1) in the 1948 Ordinance. Since the latter was replaced by the Ordinance of 1956 and now by the Act of 1966, an order for possession does not necessarily follow merely upon proof of any breach of written law, but the court is required to exercise its discretion in deciding whether or not an order should be made. In the instant case, the fact that there was no breach of by-law had not been taken into account, nor that the appellants, in all respects good and satisfactory tenants, were sought to be evicted on purely technical grounds, whereas the real reason was that they did not consent to pay the exorbitant rent demanded by their landlords.

The appeal was accordingly allowed and the order of the High Court set aside. Taking all the circumstances into consideration we thought no order as to costs would be fair to all parties.

Appeal allowed.

Solicitors: *T. S. Chiam & Co.; S. Seenivasagam & Co.*

L. v. COMPTROLLER-GENERAL OF INLAND REVENUE

[A.C.J. — (Chang Min Tat J.) March 28, 1973]

[Penang — Originating Motion No. 2 of 1969]

Income Tax — Land obtained as a gift — Agreement with developing company — Syndicate formed with object of erecting houses on land for sale — Land sold to developing company at price above assessed value — Single Transaction — Whether profits from transaction liable to income tax — Whether agreement establishes a trade or trading in land — Whether adventure in nature of trade.

In this case the appellant had received a piece of land from his father as gift. Subsequently, he wished to sell the land to a developer but as no agreement could be reached as to the price, an agreement was entered whereby the developer, a private limited company, and the appellant formed a syndicate with the object of erecting houses on the land for sale. It was agreed the land valued at $145,920 was to be regarded as the contribution of the appellant to the syndicate and that after the scheme was completed and the houses sold, the syndicate would pay the sum of $145,920 to the appellant and also pay to him one-half of the nett profits of the venture. The appellant took no part in the transaction except to be a party to the agreement and to receive an amount which consisted of a sum representing the expressed sale price of the land to the syndicate and a half of the profits, which together came to the price he demanded for the land. The scheme was successful and at the end the appellant received $145,920 plus $39,175 representing half the profits.

The Comptroller-General of Inland Revenue treated the sale by the taxpayer to the syndicate as carrying on the trade of dealing in land and he treated the difference of $46,920 between the price of $145,920 at which the land was sold and the price of $99,000 at which the land was valued for purposes of assessing the stamp duty to be paid on the deed of gift, as assessable income, being his profit. The Comptroller-General also raised additional assessment of income tax on the amount of $39,175 as partnership income from the syndicate's business.

The taxpayer appealed to the Special Commissioners, who overruled the Comptroller-General in respect of the difference of $46,920. They held that there was no sale of the land but that the value of the land represented the appellant's contribution to the capital of the syndicate. They therefore "cancelled" the assessment of income tax on this sum and from this decision there was no appeal.

The Special Commissioners also held that the sum of $39,175 was income from the business and therefore liable to tax. The appellant appealed from this decision.

Held: (1) on the facts of this case the transaction was a sale of property with a provision for an enhanced price and therefore only an adventure in the nature of trade;

(2) as such the profits therefrom were not liable to tax under the provisions of the Income Tax Ordinance, 1947, and therefore the appeal must be allowed.

Cases referred to:-

(1) *Bank of New Zealand* v. *Simpson* [1900] A.C. 182.

(2) *Martin* v. *Lowry* 11 T.C. 297.

(3) *E.* v. *Comptroller-General of Income Tax* [1970] 2 M.L.J. 117.

(4) *Eames* v. *Stepnell Properties Ltd.* [1967] 1 W.L.R. 593.

CASE STATED.

I. K. Cheah and *Lim Kean Siew* for the appellant.

Nik Saghir bin Mohamad Noor (Federal Counsel) for the respondent.

Chang Min Tat J.: This is an appeal by way of case stated from the deciding order of the Special Commissioners that the sum of $39,175 purported to

be the balance purchase price of a piece of land sold by the taxpayer to a housing developer was profits accruing to the taxpayer from the business of housing development and therefore assessable to income tax for the year of assessment 1960.

The facts found by the Special Commissioners have been set out in detail in Annexure A. They are not greatly in dispute. The main facts are as follows:—

The piece of land in question was part of certain lands purchased by the taxpayer's father in 1919 and on 6 April 1957, conveyed to him as a gift, in consideration of the natural love and affection held of him by his father. For the purposes of stamp duties, the land was assessed at a valuation of $99,000. The land which was given was Lot 616, comprising an area of 97,289 square feet.

The land was originally zoned for Class D for a density of two double-storied compound houses to an acre. Prior to the gift, the taxpayer's father had applied for re-zoning. The application was pursued by the taxpayer and on 28 May 1959, approval was given for re-zoning to Class C for a density of four double-storied compound houses to an acre and Class D2 for four sets of double-storied semi-detached houses to an acre.

The Special Commissioners took cognition of the fact that land zoned for Class C and Class D2 would fetch a higher price than land zoned for Class B.

A housing developer became interested in this Lot 616 as a potential site for development and entered into negotiations for the purchase of the property for a housing estate. The bargaining at some stage reached a deadlock, if I may so paraphrase the statement of facts, with the taxpayer setting a minimum of $2 per square foot and the developer offering a maximum of $1.50. This deadlock was broken by an agreement, entered into in writing on 27 June 1959, whereby the developer, a private limited company and the taxpayer formed a syndicate with the object of erecting houses on the land for sale.

The Special Commissioners noted the fact that the developer had another iron in the fire, the business of goldsmiths and the further fact that the taxpayer as the Secretary-General of the Labour Party and the Socialist Front was at that time busy with the general elections. He was consequently in the years of 1958 and 1959 in Penang on an average of 3 months in a year and that his idea of disposing the land was to obtain funds for fighting the election. He needed money and he completed the negotiations for the sale of this land.

It might be convenient at this point to refer to the pertinent clauses of his agreement.

The second, third and fourth recitals read as follows:

"AND WHEREAS the said (taxpayer) being desirous of developing the said land has applied to the City Council of Georetown Penang for the erection of houses according to plans to be approved by the City Council.

AND WHEREAS the said (taxpayer) has approached the said (developer) to start a building scheme on the said land to erect houses thereon in accordance with the aforesaid layout plan to be approved by the City Council, for sale to the public and for profit and for the purposes to form a syndicate between the parties hereto.

AND WHEREAS the said (developer) is agreed to the suggestions by the said (taxpayer) as set out above."

The operative clauses are:

"4. The value of the said land shall for the purposes of the syndicate be valued at $145,920/- which sum be taken as contribution to the syndicate by the said (taxpayer) who shall not be called upon to make any further payments whatsoever in cash or in kind to the capital of the syndicate.

5. The said (developer) shall be entirely responsible to provide the capital for the building costs . . . and shall provide such further capital required from time to time to carry out the objects of the said syndicate.

6. On the execution of this agreement the said land shall become the property of the syndicate. . . .

9. The said (developer) shall be the manager of the syndicate and he shall have full and complete and unrestricted power and right of management of the syndicate without any interference from the said (taxpayer) and he may do whatever is necessary for the construction and sale of the houses to be built by the syndicate. . . .

11. The syndicate shall pay the sum of $145,920/-. . . .

12. The said (developer) hereby undertakes to indemnify the said (taxpayer) against any loss whatsoever that may be suffered by the syndicate that is not due to the wilful neglect or default of the said (taxpayer). . . .

13. Upon the completion of this scheme the syndicate shall wind up its business and the nett profits if any shall be divided equally between (them)."

Clause 15 provides that if the building scheme shall be abandoned, the (developer) shall pay the sum of $145,920 and in return the (taxpayer) shall subdivide the land at the developer's cost and convey the said land to the developer absolutely and in fee simple.

At the execution of the agreement, the land, Lot 616, had not been sub-divided. Pursuant to the agreement, the syndicate carried out a building scheme on the land. It subdivided the land, built houses and sold the houses and the sub-divided lots. The total cost of building was $379,563 which was borne entirely by the developer. No interest on this amount was charged to the syndicate. Pursuant to Clause 13, the taxpayer received the sum of $39,175. He received this sum without calling for or checking the accounts of the syndicate. He never attended any of the meetings of the syndicate called and he never interfered with the syndicate in carrying out the project.

As for the sum of $145,920 to be paid him under clause 4, he received in cash the amount of $53,420 and three houses valued at $92,500. These sums were treated by the taxpayer and the syndicate as payments under clause 11. For the purpose of this appeal, nothing turns on the valuation of the houses.

Either before or after joining the syndicate, the taxpayer has not carried out any transactions in land other than those in connection with the syndicate's project but he has bought one piece of land for his own use.

On 25 July 1968, the valuation officer of the Treasury Valuation Division, Northern Region valued Lot 616 at $99,000 as at 6 April 1957 and at $112,000 as at 27 June 1959.

The Comptroller-General of Inland Revenue treated the sale by the taxpayer to the syndicate as carrying on the trade of dealing with land and treated the difference of $46,920 between the price of $145,920 at which the land was sold and the price of $99,000 at which the land was valued for purposes of assessing the stamp-duty to be paid on the deed of gift as assessable income, being his profit.

The Comptroller-General also raised additional assessment of income tax on the amount of $39,175, as partnership income from the syndicate's business.

The taxpayer appealed to the Special Commissioners who over-ruled the Comptroller-General in respect of the difference of $46,920. They held that there had been no sale by the taxpayer of his land, that the market-value of the land as at 27 June 1959 was $145,920 and that this sum represented the taxpayer's contribution to the capital of the syndicate. They therefore cancelled, if that is the right word, the assessment of income tax on this sum. From this decision there is no appeal by Revenue.

They however confirmed the assessment on the $39,175 which they held was income from business and not a share of partnership income. It is from this decision that the present appeal lies.

The question for the opinion of the High Court is framed as follows: whether on the facts found by them, the Special Commissioners are right in deciding

(1) that the taxpayer and the developer under the name of the syndicate carried on the business of building houses on the land in question

(2) that for the purpose of determining the taxpayer's profits from the said business the value of the stock-in-trade of the syndicate consisting of the land should be $145,920 as agreed between the members of the syndicate

(3) that profits of an amount of $39,175 accrued to the taxpayer from the said business and

(4) that the said profits are assessable to income tax for the year of assessment 1960.

The law applicable in this case appears to be well-settled. Capital appreciation derived by sale where the sale is not carried out as trade or in the course of trading is not caught by the taxing statute, nor under the law as then in operation, is the income derived from an adventure of the nature of a trade. But income from a trade or profession is assessable to tax.

It is in the application of the law to the facts of this case that differences arose. The taxpayer contends that this single transaction in land, deeded to him originally by way of gift by his father, was a genuine sale and that any difference arising from the appreciation of the land above the amount assessed for the purpose of stamp duty was capital appreciation. He further argues that the sale price for $145,920 certain and a 50% profit in the housing development was only a way to break the dead-lock in the sale and this peculiar arrangement did not invalidate the sale as such. He is by profession an advocate and solicitor and he was an active politician. Alternatively he argues that at the very worst, this single transaction was an adventure of the nature of a trade.

Revenue however contends that the agreement in writing speaks for itself and firmly establishes a trade or a trading which puts the sum of $39,175 which is half the profits of the syndicate firmly within the taxing net.

In approaching this case, it will be useful, I consider, to bear in mind the provisions of section 92 of the Evidence Act, which ban any evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of the agreement in writing, except that by proviso (f) any fact may be proved which shows in what manner the language of the document is related to existing facts: see *inter alia* *Bank of New Zealand* v. *Simpson*.[1]

Having regard to these provisions I would initially with respect agree with the Special Commissioners that the agreement "cannot be brushed aside and ignored" but with equal respect consider that while they were right in entertaining evidence of the surrounding circumstances, they erred to my mind in their consideration of these surrounding circumstances.

Now, it has been said in *Sarkar* on Evidence (12th Edn.) at p. 833

"The object of the admissibility of the evidence of surrounding circumstances is to ascertain the real intentions of the parties, but these intentions must be gathered from the language of the document, as explained by the extrinsic evidence."

And in the judgment of the Privy Council delivered by Lord Davey in the case of the *Bank of New Zealand* v. *Simpson, supra,* at page 187-188 —

"Extrinsic evidence is always admissible not to contradict or vary the contract, but to apply it to the facts which the parties had in their minds and were negotiating about."

It is to be noted that learned Federal Counsel did not object to the admissibility of such evidence, with respect, quite rightly and would appear to be well contented with the findings of the Special Commissioners in respect of the surrounding circumstances.

In their view, the surrounding circumstances established what I made bold to describe as an impasse, the taxpayer not budging below a minimum of $2 per square foot and the developer refusing to go above $1.50. In their words,

"they (the parties) negotiated further and eventually... entered into a written agreement."

(para 4 of the Statement of Facts found).

On the interpretation of clause 4 of the agreement, the Special Commissioners found that the value of the land set at $145,920 was the taxpayer's contribution to the syndicate. The taxpayer contends that this was not a proper interpretation and submits that the agreement read as a whole and having regard to the differences in the price per square foot and to the fact that in the end, it was found that he achieved his set price by the $39,175 paid to him as half of the factual profits means essentially that it was a sale of his land and not only that the difference between the valuation of $99,000 and the $145,920 but also the difference between $99,000 and $145,920 + $39,175 was capital appreciation by sale of capital assets.

On the other hand, Federal Counsel argues that there had been factually no sale, as the only sale contemplated was in the eventuality of an abandonment of the scheme, and the fact remains that the scheme was successfully completed.

It is common ground that this was insofar as the taxpayer is concerned a single transaction. I bear in mind that an isolated transaction can be a trade, see, *inter alia*, Rowlatt J. in *Martin* v. *Lowry*.[2] In this single transaction, the taxpayer had played no part except to be a party to the agreement and to receive an amount which consisted of a sum certain representing the expressed sale price of the land to the syndicate and a half of the profits, which together came up to the price he demanded for the land. He had only a right to examine the accounts. This was clearly to preserve his interests in the sum he would be getting. However the "full and complete and unrestricted power and right of management of the syndicate" was in clause 9 reserved only to the developers, without any interference from the taxpayer. The provisions reserved for performance on the part of the syndicate were financial and clearly meant for the purpose of the computation of the profits. In this computation of profits no interest was chargeable to the syndicate on the moneys advanced by the developers, on whom the full burden of making the financial provisions fell. The taxpayer did not have to provide a single cent. Neither was he liable for loss, if any. In such an event, he would still be entitled to the sum certain for the land.

It is in these circumstances that the taxpayer characterises the transaction to be one for sale of his land to the developer. But of course the agreement remains to be construed and on a proper construction, and having regard to all the surrounding circumstances of the case and to the law so adequately canvassed, if I may so put it with every respect, in the judgment of Gill F.J. in *E.* v. *Comptroller-General of Inland Revenue*,[3] a judgment of the Federal Court, the transaction so far as the taxpayer is concerned is an adventure in the nature of a trade.

I adopt with respect the concluding words of Gill F.J.:

"In the final analysis the answer to this appeal is fairly simple. The transaction by the appellant in this case must be taken as an isolated transaction. As an isolated transaction, it was an adventure in the nature of trade. In the absence of a definition of 'trade' extending that term to an adventure in the nature of trade, as the English Income Tax Acts do, this single transaction did not constitute a trade of the appellant within the meaning of section 10(1)(a) of the Income Tax Ordinance, 1947. As it was but a single business transaction carried out by the appellant and not part of a business carried on by him, it did not constitute the business of the appellant either within the meaning of the same section. The profit arising therefrom is therefore not subject to tax under that section."

I also accept, with respect, the correction of the error made by me in *E's* case at first instance and at page 122 my appreciation of *Eames* v. *Stepnell Properties Ltd.*[4]

In this latter case, the acquisition of land with the intention of selling at a profit and sale after active steps were taken such as obtaining planning permission and conversion from agricultural land to residential development was held to be an adventure in the nature of a trade.

I therefore take the view that on the facts of this case, the transaction was a sale of property with a provision for an enhanced price and therefore factually an adventure in the nature of a trade.

The appeal is allowed with costs. The order of the Special Commissioners is set aside.

Appeal allowed.

Solicitors: *Lim Kean Siew & Co.*

L.K.C. v. COMPTROLLER-GENERAL OF INLAND REVENUE

[A.C.J. — (Chang Min Tat J.) March 28, 1973]

[Penang — Originating Motion No. 1 of 1972]

Income Tax — Sale by rubber tapper of lands belonging to him in order to invest in other pieces of land — Multiple transactions — Whether constitute dealing in land — Whether profits liable to tax.

The appellant was a rubber holder and rubber tapper. He bought certain rubber lands in 1960, 1961 and 1963 and tapped on the lands. In 1966 he sold fifteen lots of the land in various transactions, making in all a profit of $107,957. Subsequently, in the same year, he bought three portions of a rubber estate in Penang. The appellant was assessed to tax in respect of the profits, and his appeal to the Special Commissioners was dismissed. He appealed to the High Court and contended that the profits represented capital appreciation.

Held: the sale in this case was a sale of capital assets and the difference in price, an appreciation which at law was not caught by tax.

Per Chang Min Tat J.: "It is to my mind clear that what the appellant did was to sell and invest the proceeds in other pieces of land. The sale of lands in question within a very short space of time for the clear purpose of reinvestment must in the circumstances of this case take away any significance of multiple transactions."

Cases referred to:

(1) *E.* v. *Comptroller-General of Income Tax* [1970] 2 M.L.J. 117.

(2) *Pickford* v. *Quirkes* 13 T.C. 251.

(3) *Macmahon and Macmahon* v. *Commissioners of Inland Revenue* 32 T.C. 311.

(4) *Hudson's Bay Co.* v. *Stevens* 5 T.C. 424.

(5) *Evans* v. *F.C. of T.* (1936) 55 C.L.R. 80.

CASE STATED.

I. K. Cheah for the appellant.

Mohamad Nizar bin Idris, Federal Counsel, for the respondent.

Chang Min Tat J.: This is an appeal by the taxpayer from the decision of the Special Commissioners confirming the assessment of the profits derived from the sale of 15 lots of land in Sitiawan as income assessable to income tax on the basis that the taxpayer was trading in land.

In the case stated, the facts found by the Special Commissioners were as follows: